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Supreme Court of the United States

OCTOBER TERM, 1952

No. 791

MARSHALL NEAL, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Marshall Neal, Jr. asks this Court for a writ of certiorari. By it he seeks review of the judgment of the court below affirming his conviction for refusing to submit to induction.

Opinion Below

The opinion of the court of appeals is not yet reported. It appears in the record. [138-149][1] The opinion was amended [142] on the grounds complained of in the motion to correct it made by counsel. [150-153]

[1] Figures appearing in brackets refer to the pages of the printed transcript of the record.

Jurisdiction

The judgment of the court of appeals was entered March 26, 1953. [149] Mr. Justice Jackson extended the time for filing this petition to May 11, 1953. [162] The jurisdiction of this Court is based on 28 U. S. C. § 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Questions Presented

I.

How Involved

Section 6 (j) of the Selective Service Act of 1948 provides that upon appeal to the board of appeal from a denial of the conscientious objector claim, the claim must be referred to the Department of Justice. The statute requires an "appropriate inquiry" followed by a hearing. The hearing officer reports to the Department of Justice. The department then recommends either that the conscientious objector claim be granted or that it be denied.

Neal filed with his local board a conscientious objector form, properly filled out. This submitted proof showed him to be a conscientious objector. When he requested a personal appearance, the local board sent his case to the appeal board. The appeal board forwarded the file to the Department of Justice for the statutory inquiry and hearing. An agent of the F.B.I., without properly explaining to Neal his rights, induced him to waive his conscientious objector claim. The basis for the waiver was that Neal had been led to believe that he could not legally present the claim as a minister and as a conscientious objector at the same time. He was led to believe that he had to elect between the two claims and present only one claim.

Question One

Whether petitioner was unlawfully denied a full and fair hearing upon his appeal because he was illegally induced to waive his claim for classification as a conscientious objector by an agent of the Federal Bureau of Investigation?

II.

How Involved

Section 1624.1 of the regulations gives every registrant an opportunity to appear personally before the board, following an unfavorable classification, for an oral hearing when requested in writing within ten days after notice of classification. Section 1624.3 of the regulations specifically prohibits induction until the personal appearance procedure is complied with.

By letter within 10 days of classification Marshall Neal requested a personal appearance at Austin, Texas. The board was located at Houston. While he had no right to have his board come to Austin from Houston, the request was for a personal appearance and it was in writing.

The local board failed to reply to the written request. It did not inform Neal that he had no right to a personal appearance in Austin. The board, on the contrary, illegally forwarded the file to the appeal board without giving Neal a chance to have a hearing before his local board in Houston.

Question Two

Whether the draft board proceedings are void because the local board failed to grant petitioner his personal appearance requested in writing and required by the Selective Service Regulations?

III.

How Involved

At the time of filing his questionnaire Marshall Neal was devoting 100 hours per month to his ministry. He was devoting 132 hours per month to secular work. He quit his secular employment and then moved from Houston to Austin. There he increased the total monthly hours devoted to his ministry and diminished his secular work to mere part-time employment, incidental to his ministry. He devoted 300 hours per month to the ministry and 80 hours per month to secular employment. This was an important change in his status under the act. The state director was informed of the change of status. This was called to his attention after the appeal board had considered Neal's case and denied him his claim for exemption. The director, notwithstanding the appeal board's determination, suggested to the board to hear the petitioner orally and determine whether to reopen his case. Petitioner appeared and testified as to his change of status. The local board, notwithstanding this showing, refused to reopen the case and give Neal a new start, in spite of the fact that he had been denied his right to a personal appearance by the local board.

Question Three

Whether the draft board proceedings are void because the local board arbitrarily and capriciously refused to reopen the case as requested by Neal prior to induction?

IV.

How Involved

At the time petitioner's case was considered by the National Selective Service Appeal Board, the change of status, increasing hours in the ministry and decreasing hours devoted to secular work, was called to the attention of the appeal board. The record presented to it showed that Marshall Neal was pursuing the ministry as his vocation.

Question Four

Whether there was no basis in fact for the denial of petitioner's claim for exemption as a minister of religion?

V.

How Involved

At the trial Neal testified about the inducement of the agent of the F.B.I. causing him to waive his conscientious objector claim. Although the agent admitted enough facts to prove that the waiver had been illegally obtained, he denied some material evidence given by petitioner. On cross-examination of the agent, a proper demand for the production of the F.B.I. report was made. The court refused to compel the production of the secret investigative report made by the agent.

Question Five

Whether reviewable error was committed in not compelling the production of the report to be used as evidence at the trial?

Statute and Regulations Involved

I.

"Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."—62 Stat. 609, 50 U. S. C. App. § 456 (j).

Section 1626.25 of the Selective Service Regulations (32 C. F. R. (1949 ed.), § 1626.25) provides:

"(c) The Department of Justice shall . . . make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the

time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained."

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

II.

Section 1624.1 of the Selective Service Regulations (32 C. F. R. (1949 ed.), § 1624.1) states:

"Opportunity to Appear in Person.—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated

for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended."

Section 1624.3 (32 C. F. R. § 1624.3):

"Induction Postponed.—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in paragraph (d) of section 1624.2."

III.

Section 1625.2 of the Selective Service Regulations (32 C. F. R. (1949 ed.), § 1625.2) provides:

"When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classi-

fication of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

IV.

Section 6 (g) of the act reads as follows:

"(g) Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title."—50 U. S. C. 456 (g), 62 Stat. 609.

Section 16 (g) (1), (2) and (3) (32 C. F. R. § 16 (g) (1), (2) and (3)) reads as follows:

"(g) (1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation

preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization." —50 U. S. C. 456 (g) (1), (2), (3), 62 Stat. 624.

Section 1622.19 of the Selective Service Regulations (32 C. F. R. (1949.)) provides:

"Class IV-D: Minister of religion or divinity student. (a) In Class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion;

"(3) Who is a student preparing for the ministry under the direction of a recognized church or

religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

"(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been preenrolled."

Statement

The petitioner was charged by indictment with refusing to submit to induction. [1-2] A jury trial was waived and the case was tried to the court without a jury. [16-17]

No dispute as to the refusal to submit to induction was made. Petitioner admitted that he refused to submit to induction. [24] Petitioner contended that the order of the draft board was illegal for the reasons stated in his motion for judgment of acquittal. [119-121] The motion was overruled. [121-122]

The petitioner was sentenced to serve a term of three years in the custody of the Attorney General of the United States. [123] He timely filed a notice of appeal. On appeal the court below affirmed the conviction.

The facts leading up to the indictment appear in the draft board file, except the evidence about the waiver of the conscientious objector claim. These facts shall now be stated.

Petitioner, a Negro, registered with Local Board No. 56 of Harris County, Houston, Texas, on September 13, 1948. [25] On August 10, 1949, he filed his Selective Service Questionnaire. In Series VI on page 3 of the questionnaire he stated that he was a minister of religion and that he regularly served as a minister of Jehovah's witnesses since June, 1946. He also stated that he had been formally or-

dained and that his ordination was performed in June, 1946.—See Defendant's Exhibit 1. [34]

Appearing in the selective service file of petitioner are two certificates of ordination. One is printed and countersigned by the petitioner. (See Defendant's Exhibit 2.) The other is typewritten and bears the signature of T. J. Sullivan, Superintendent of Ministers and Evangelists for the Watchtower Bible and Tract Society, Inc. This document was sworn to before a notary.—See Defendant's Exhibit 19.

The petitioner showed in his questionnaire that he was married but separated from his wife, there being no children. (See Series VII, page 4, of Defendant's Exhibit 1.) He showed that he was, in addition to being a minister, a porter and truck driver at a laundry in Houston. (See page 4 of Defendant's Exhibit 1.) He worked, at that time, an average of 36 hours per week. [5]

Upon the trial petitioner testified on cross-examination that he had at one time been treated for gonorrhea. [65] This statement was made in the questionnaire. (See Defendant's Exhibit 1, page 7.) The disease was contracted from his wife who was guilty of adultery. Petitioner divorced her for that reason. [68-69] The United States Attorney also developed from petitioner that he had been convicted of stealing, according to the Classification Questionnaire. [63-64] (See Defendant's Exhibit 1, page 6.) Apparently the petitioner was not convicted for stealing but was arrested for the crime and dealt with as a juvenile. [63-64] The offense occurred before he became one of Jehovah's witnesses. [68]

In the questionnaire petitioner showed that he had conscientious objections to war. He signed the blank appearing in Series XIV. (See Defendant's Exhibit 1, page 7.) The signing of this statement required the local board to mail to him a special form for conscientious objector. This was done. Petitioner filled out the form. He made full answers showing that he was, by reason of religious training and

belief, conscientiously opposed to participation in war in any form and that he was opposed to military training and service. (See Defendant's Exhibit 9.) [48] This form was filed with the local board on September 14, 1949.

On August 22, 1950, the local board classified petitioner I-A-O. This classification made him liable for training and service in the armed forces as a conscientious objector. Such classification would require him to wear the military uniform and perform medical or other noncombatant service in the armed forces.

On August 30, 1950, within ten days from time of the classification, petitioner wrote a letter to the local board stating, "I would like to appeal that classification." In the letter he pointed out that he was an ordained minister of the gospel and applied for a IV-D classification. He asked to be granted the same privileges as other religious ministers.—See Defendant's Exhibit 10.

On September 5, 1950, his case was forwarded to the board of appeal. The board of appeal, on September 15, 1950, tentatively denied petitioner his exempt classification and referred his file to the Department of Justice for an investigation as to the good faith of petitioner's claims as a conscientious objector.[2]

The United States Attorney and the Federal Bureau of Investigation at Houston, instead of conducting the investigation, communicated with the San Antonio office of the Federal Bureau of Investigation to obtain from the petitioner a statement that he based his claim solely on the ministry and waived his claim for classification as a conscientious objector. [72]

An agent of the F.B.I. in Austin called on the petitioner for the purpose of determining whether petitioner relied on his ministerial status or his conscientious objector status.

[2] The act and the regulations require an extensive investigation and a hearing before a hearing officer when the file is referred to the Department of Justice by the appeal board.—See 50 U. S. C. App. § 456 (j) and Section 1626.25 (a) (4), (b), (c) and (d) (32 C. F. R. 1626.25).

[99] After stating the purpose of his visit he asked petitioner to sign a statement that he had prepared before calling on petitioner. [76, 99] The agent informed the petitioner that if he "was relying on his ministerial occupation" he "would like to take a statement from him to that effect". [99] The agent said that petitioner stated he was relying on his claim for a ministerial classification and that he saw no reason why he could not sign it. [100]

The petitioner testified that the agent informed him that he could not claim both the ministerial classification and the conscientious objector classification but that "you must take one or the other". Petitioner told him that he was a conscientious objector as well as a minister. He testified that the agent stated that if he gave up the conscientious objector claim he would get a classification "as a minister and not be subject to the draft". [50-51] Petitioner stated that he believed what the agent told him, having confidence in him as a representative of the Government, and because of what the agent told him and the request that the agent made, he signed a paper waiving his conscientious objector claim. [51]

The statement previously prepared by the agent and signed by the petitioner states, among other things, the following:

> "I hereby state that I am not a conscientious objector and voluntarily withdraw my claim for classification as such. In appealing from the classification of my local board, I requested classification in Class IV-D as a minister and relied solely upon that claim and do not wish or claim to be classified in Class IV-E or Class I-A-O. I understand that by signing this statement no further consideration will be given to my conscientious objector claim." —Defendant's Exhibit 13.

The process employed by the United States Attorney

and the office of the F.B.I. at Austin fully aborted the obligations imposed upon the department by 50 U. S. C. App. § 456 (j) and Section 1626.25 (a) (4), (b), (c) and (d) (32 C. F. R. 1626.25). The conspiracy to abort the requirements of the law was in accordance with a policy established by the Department of Justice through circulars sent out by the Attorney General.

Circular No. 3461, Supplement No. 9 dated September 28, 1943, Section III (3) provides, among other things, that upon interview by an agent if the registrant "clearly and unequivocally states that he does not desire or will not accept a conscientious objector classification . . . the registrant should be given an opportunity to sign a statement to that effect". The statement to be prepared by the agent for the signing by the registrant is identical to that signed by the petitioner in this case. (See Section III (4) of Circular No. 3461; Defendant's Exhibit 21.) Subsection (6) of Section III of Circular 3461, Supplement No. 9, provides that "if the registrant signs such a written withdrawal of his claim no further inquiry need be conducted". Subsections (6) and (7) provide for the return of the file to the Selective Service System by the Department of Justice with a copy of the original statement placed therein. (See Defendant's Exhibit 21, pages 2 and 3.) This circular and subsequent circulars with their supplements are printed as Appendix A to this petition, pp. 55-64.

Upon the return of the file to the board of appeal the entire draft board file was returned to the local board and petitioner's case was reopened by the local board. (See Defendant's Exhibit 12.) Following the reopening on December 6, 1950, petitioner was reclassified by the board in Class I-A. On December 7, 1950, the local board mailed petitioner a notice of the new classification by the local board.—See Defendant's Exhibit 1, page 8. [26]

On December 12, 1950, petitioner wrote the local board from Austin, among other things, as follows:

> "I would like to appeal such classification, because of the fact I am an ordained minister of the gospel. I would like very much to appear in person before the particular draft board in which I am registered with, but because of me living here in Austin, Texas, I am not able to do so. But if there is any ways that can be made for me to appear in person here in Austin I would appreciate it very much. The reason why I would like to make such appearance, so that I can prove to you beyond any future doubt that I am an ordained minister of the gospel."—See Defendant's Exhibit 14.

The local board did not answer the petitioner's letter. It erroneously considered his request for a personal appearance as a request to reopen and the board members voted that they "refused to reopen". (See Defendant's Exhibit 1, page 8.) This was on January 4, 1951.

On January 10, 1951, the cover sheet was forwarded to the board of appeal without any notice to the petitioner of the fact that his request for personal appearance had been refused by the order of the board not to reopen. On January 12, 1951, the appeal board classified petitioner in Class I-A and on January 16, 1951, the local board notified petitioner of such classification.—See Defendant's Exhibit 1, page 8.

On January 24, 1951, petitioner wrote to General Lewis B. Hershey, National Director of Selective Service at Washington, D. C., requesting that he correct the injustice done petitioner by the improper classification. He said, among other things:

> "I feel this may be due to the manner in which I was induced to respond by Mr. H. T. Burt of the F.B.I. I now feel he misrepresented to me information contained in the Classification Questionnaire and Special Form for Conscientious Objec-

> tors. In spite of the provision in the Questionnaire for a minister to file claim for exemption or deferment on both grounds (as a minister and as a conscientious objector) Mr. Burt said this was not allowable and persuaded me to withdraw the latter claim. I realize my original claim was proper." —See Defendant's Exhibit 16.

The file was thereafter called in to State Headquarters of the Selective Service System at Austin at the request of General Hershey. The State Headquarters asked the United States Attorney about misrepresentations claimed to have been made by the F.B.I. Agent Burt. The United States Attorney stated that, "Mr. Burt unequivocally denied the registrant's statement as to any misrepresentation."—See Defendant's Exhibit 6.

While the file was in the office of the state director at Austin, the state director wrote petitioner a letter on February 6, 1951, informing the petitioner, among other things, as follows:

> "Upon receipt of your original letter to this Headquarters, we contacted your local board and advised them that, if they felt that your case warranted further consideration or reclassification, they had the authority to accomplish this. . . . This does not mean that your reclassification is promised but merely that your case will be looked at in the light of the information in your file at that time to see what action may, or should be, taken."—See Defendant's Exhibit 17.

On February 28, 1951, the local board mailed petitioner a notice to report for induction at the Air Force Induction Station at San Antonio, Texas, on March 12, 1951. [26] On March 5, 1951, petitioner went to the office of the state director. [52] On that day the state director wrote the local board as follows:

"We realize the considerable work and time your board has spent on the case of this registrant and we greatly appreciate your patience and consideration in this case. However, Neal stated that he was a *full-time* minister of religion and did not work at any other occupation and that he teaches and preaches the principles of religion on a full-time basis. He stated that, at the time he was recently afforded the opportunity to present evidence in his case to your board, he did not realize that this was the crucial point in issue and he stated that it was due to his ignorance and lack of understanding that he failed to attempt to clarify this point in the minds of the board members. He stated that he intended to refuse induction which is, of course, his privilege and he well realizes, we believe, the consequences of such action.

"Neal was advised that it would be up to him to attempt to convince your board upon his claims of being a full-time minister of religion, which is, of course, somewhat different from the usual case of Jehovah's Witnesses. We have no idea of whether or not his claim in this respect is true, and he was advised that it was completely up to your board to determine whether this information warranted reopening his case or not.

"This letter is not a request for the reopening of this registrant's case but is merely to advise your board that if the registrant can present a case now to you which would show he is a duly ordained minister of religion and 'as his regular and customary vocation teaches and preaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization' your board could request this Headquarters for permis-

sion to reopen the case and this would be given the utmost possible favorable consideration. If your board does not feel that he makes out a reasonable case for this point then, of course, mere notification to him of this fact will end the matter. The same applies with regard to whether or not he can make out a reasonable case for sincere and conscientious objection to participation in war on an individual basis and for religious reasons.

"We are offering the above suggestions in the light of the new information submitted by the registrant to us that he is a *full-time,* duly ordained minister of religion, feeling that perhaps your board has not had an opportunity to consider this fact, if true."—See Defendant's Exhibit 3.

The date for the hearing before the local board to determine whether or not the case would be reopened was fixed for March 7. Petitioner arrived at the board at about 2:00 o'clock. [54] The local board apparently had a stenographer to take down in shorthand and transcribe by typewriter what took place. A memorandum purporting to be a verbatim report of the hearing down to and through the ninth question and answer appears in the file. (See Defendant's Exhibit 4.) The ninth question was: "Do you love America enough to fight for it?" The petitioner answered: "No." On receiving this answer the local board and stenographer both failed to make any further record of what took place. Petitioner explained fully the reasons why he had conscientious objections to war. [55-56] He informed the local board that he devoted three hundred hours a month to preaching. [58] Upon his informing the local board of this the board informed petitioner, "We do not even want to talk with you any more. We are going to put you in Class I-A." The board members asked the clerk when he was to be inducted. On being informed that it was in the very near

future, one board member said, "That's good. We don't want to talk to him any more." [58]

Petitioner was prepared to show that the small amount of secular work that he was doing since moving to Austin, Texas (which was only about three or four hours daily), did not interfere with his performing his full-time ministry work (which was three hundred hours per month). [48, 58-59]

The local board, following the hearing, telephoned the state director for advice. On March 8, 1951, the state director wrote the local board, among other things, as follows:

> "You are advised that, under the limitations of Part 1625.2 of the Regulations, it is the opinion of this Headquarters that your local board has no authority to reopen the case of this registrant unless your board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.
>
> "A local board may always request authority from this Headquarters to reopen the case of any registrant who, in the opinion of the local board and upon new information, would be done a grave injustice if his case were not reopened. In the absence of such a determination on the part of the local board in this case, however, we do not feel that your board has any authority to reopen the case of this registrant."—See Defendant's Exhibit 5.

Petitioner reported at the induction station at San Antonio on March 12, 1951. [60] He refused to submit to induction after having completed the selective process of medical examinations. [60] He signed a statement certifying to his refusal to be inducted. [27, 60]

Following the indictment, the draft board file was re-

turned by the Department of Justice to the Selective Service System. Then General Lewis B. Hershey, National Director of Selective Service, appealed to the president from the I-A classification given to the petitioner by the appeal board January 12, 1951. [35] (See Defendant's Exhibit 7.) The National Selective Service Appeal Board classified the petitioner in I-A on a vote of 3 to 0. [36]—See Defendant's Exhibit 8.

Reasons for Granting the Writ

I.

There is drawn in question the legality of the procedure followed by the Department of Justice in conducting the "appropriate inquiry" under Section 456 (j), of the Selective Service Act of 1948. The statute provides for appropriate inquiry or investigation. This is followed by a hearing. Both the statute and the regulations, Section 1626.25, make mandatory the investigation, the hearing and the recommendation to the board of appeal by the Department of Justice.

The F.B.I. agent followed the procedure in obtaining the waiver, fixed by the Department of Justice. It is provided for by Circular No. 3461, Supplement No. 9, dated September 28, 1943; Circular No. 3461, dated August 4, 1944; Circular No. 4063, Supplement No. 2, dated December 6, 1948; and Circular No. 4063, Supplement No. 5, dated July 18, 1949. These documents are printed as Appendix A to this petition, pp. 55-64.

A highly important question is here presented that has not yet been determined by this Court. It is of great and wide public importance to the nation to say whether the Department of Justice shall be permitted to instruct all F.B.I. agents to procure, where possible, waivers of the conscientious objector claim made by ministers of religion under the act and regulations. While the holding of the court below does not conflict with any other holding by a

court below, it is contrary to two holdings by a district court.

The facts in this case are identical to those involved in the case of *United States* v. *Knight,* decided by Judge McNamee of the Northern District of Ohio on April 25, 1951, in criminal cause No. 20283 on the docket of that court. The opinion is oral and is unreported. A copy of the certified report prepared by the official court stenographer accompanies this petition for writ of certiorari. In that case the judge said:

> "The pertinent facts, as I recall them, are that after the defendant Knight had perfected his appeal as a conscientious objector, the matter was sent by the local draft board to the board of appeals. It was thereupon referred to the Department of Justice, pursuant to the statute and the regulations governing such situations; and the Department of Justice made the inquiry provided for by the regulations and conducted a hearing at which the defendant was present. As the result of the investigation that was made and the hearing accorded the defendant, the agent designated by the Department to hear the matter recommended that the defendant be classified 4-E. That recommendation was forwarded to the Department of Justice at Washington and concurred in by the Assistant Attorney General there. Five days after the Assistant Attorney General at Washington concurred in the recommendation of the examining agent, Mr. Curtis, an agent from the F.B.I., visited the home of the defendant Knight. Now, I want to say most emphatically I do not believe that agent, either deliberately or otherwise, misrepresented anything to the defendant. However, the nature of the conversation was such as I think fairly to leave the implication that if the defendant at that

time withdrew his claim as a conscientious objector probably greater weight would be given to his claim as a minister. Now, unfortunately, this occurred at a time when no further consideration could be given to his claim for exemption as a minister; the board of appeals had already disallowed that claim, and had indicated its disallowance of his claim as a conscientious objector.

". . . After he signed the statement and in due course, the board of appeals, acting upon the recommendation of the Department of Justice, classified him in 4-E, the local board followed that and classified him 4-E. So that the proceedings, conducted in the regular order, pursuant to the regulations, resulted in a determination favorable to the appellant. But after all that was done this statement which was obtained from him was then used by the local board as a basis for reclassifying him 1-A. . . .

"I don't think the law or the regulations contemplate F.B.I. agents are to procure statements for that purpose. On the basis of that classification and reclassification of 1-A this defendant took an appeal. The only ground on which he could appeal, having renounced apparently, or having been considered as renouncing his claim as a conscientious objector, the only ground on which the appeal could be taken was the basis that he claimed to be a minister. That was disallowed.

"The result of the unfortunate chain of events was that the procurement by the F.B.I. agent of this statement from the defendant was not used for the purpose of reflecting upon his good faith in making the claim of conscientious objection in the appeal that was then pending, but was used as a basis for a reclassification of him after his appeal

had been allowed, and I think that that constitutes an abuse of discretion sufficient to warrant the acquittal of this defendant; and the Court so holds. The defendant is acquitted of this charge."

A companion case was also decided by Judge McNamee on the same date. It was in No. 20284, criminal, on the docket of the same court, styled *United States* v. *Stephens.* A copy of this opinion also accompanies this petition for writ of certiorari. In that case the judge also said:

"Now, in the Stephens case, I think there is, perhaps, a more glaring violation of the regulations. There, as I recall the facts, the F.B.I. agent obtained a statement from Stephens before there was any hearing by the Department of Justice. . . .

". . . When a man appeals on the ground that he is a conscientious objector and the board of appeals disallows that claim, or, otherwise stated, is unable to classify him or does not classify him as 1-A-O or 4-E, then it is mandatory that that board receive an advisory opinion from the Department of Justice; and the law provides in terms that are unequivocal that in the preparation of that advisory opinion the Department of Justice may make an inquiry into the man's good faith in asserting his claim as a conscientious objector; but it also requires, in terms that are unmistakable, that he must be given a hearing.

"Now, in this case, the statement was obtained under circumstances somewhat similar to the Knight case, and as a result of that statement there was nothing further done about the appeal. The hearing to which the man was entitled under the law was not granted.

"It seems clear to me in a situation of that kind the Court can come to only one conclusion.

> "I don't question the honesty or integrity or the good faith of these F.B.I. agents. I have no doubt that they went out there with a view to doing what they considered their duty; but, gentlemen, it must be recognized, that in going out and interviewing a man who has claimed as a conscientious objector, the F.B.I. agent ought not to be concerned with whether he still retains his claim as a minister. The only purpose for which the F.B.I. agent is authorized to make an investigation in that connection, is, as I said and I repeat, to determine the man's good faith in respect of the claim of conscientious objection, and it seems fair to infer that when an F.B.I. agent, who carries the weight and authority of the United States Government, as he does, talks in an honest and friendly fashion to one who has made both claims, and indicates a desire to get withdrawal of one claim, that, implicit in that very situation, is the suggestion to the defendant that if he withdraws one he will receive a more favorable consideration of the other. And the fact is, in both of these cases, he could not receive any further consideration of his claim as a minister because that had been disallowed in both instances."

It is submitted that the principle announced by the court in the *Knight* and *Stephens* cases, *supra,* demonstrates the importance of the question here. The taking of the statement by the F.B.I. did not constitute an intelligent and intentional withdrawal of the conscientious objector claim and the taking of the statement was a denial of a full and fair hearing before the Department of Justice on the claim as required by the act and the regulations. This denial vitiates the proceedings.

The duties of agents of the F.B.I. in interviewing a registrant as a part of the investigation required by statute

to be made in cases of conscientious objectors is similar to that in circumstances where confessions are taken by the police or magistrates. It was the duty of the agent to explain to the petitioner his rights under the law and inform him as to the effect of his waiver. (*Haley* v. *Ohio,* 332 U. S. 596; *Turner* v. *Pennsylvania,* 338 U. S. 62) The agent in this case did not perform his duty. He followed an illegal procedure which invalidates the draft board proceedings.

There is no provision in the regulations for avoiding a hearing on the claim made by a conscientious objector by getting him to elect in writing that he bases his claim on appeal solely as a minister of religion. The statute and regulations are mandatory that there shall be an investigation.

The testimony of the F.B.I. agent in this case shows there was no investigation. The Department of Justice side-stepped this responsibility by getting the petitioner to sign the statement in evidence marked as Defendant's Exhibit 13. No such hearing was ever held. The mandatory responsibility was again evaded by the department through the strategem and ruse of a written statement signed by the petitioner.

In his letter to General Hershey requesting an appeal in January, 1951, the petitioner complained that the agent of the F.B.I. unlawfully induced him to sign the waiver. (See Defendant's Exhibit 16.) Although some parts of this testimony were denied by the oral testimony of the agent of the F.B.I., he went to the petitioner with a prepared statement and through conversation induced the petitioner to sign it. The petitioner did not prepare the statement himself. It was the F.B.I. agent that set in motion the chain of events that resulted in the waiver.

This conduct on the part of the F.B.I. agent, which resulted in depriving the petitioner of his right to a full and fair hearing in the Department of Justice on his conscientious objector claim, constituted a violation of the petitioner's right to procedural due process.

The Selective Service Regulations give a registrant the right to press simultaneously before the selective service boards as many claims as the law permits him to make. A man may be a farmer, a father of children and a judge at one time while registered before a board. The law permits him to show all three of them and urge all three of the grounds for exemption or deferment to the board. It is up to the board, in accordance with the regulations, to give him the lowest classification possible. (See Sections 1622.1, 1622.2 and 1623.2 (32 C. F. R. 1622.1, 1622.2, and 1623.2).) Section 1623.2 provides for the consideration of the various classifications in an order, beginning at the lowest class, which is V-A, and going on up the list until the highest on the list is reached, which is I-A.—See 32 C. F. R. 1623.2.

There is absolutely nothing in the act or the regulations that authorizes the Department of Justice or the Selective Service System to require that a person waive one exemption in order to claim another. The regulations have a contrary spirit.—See Local Board Memorandum No. 41 issued by General Hershey, Appendix B, pp. 65-66 below, which supports petitioner here.

In *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir. 1951), the Government contended that because the registrant had appealed from the local board to the board of appeal on only one ground, that of the ministry, he had waived the other ground of conscientious objection as a basis for exemption. The court rejected the argument. It held that the duty of the boards under the law was to consider all grounds for exemption that may appear in the file. The court held that the registrant did not have to select any particular ground. It declared that he could insist on all the grounds of exemption raised in the record. This decision augments the position of the petitioner supported by the regulations above quoted.

The inadvertent failure of the Selective Service System to refer the file to the Department of Justice for an inves-

tigation has been held to be a basis for the dismissal of the indictment in several unreported holdings by the district judges in various parts of the country.

If an inadvertent failure of the draft board to refer the file to the Department of Justice is a denial of a full and fair hearing so as to vitiate the proceedings, then, by force of a much stronger reason, the taking of a written waiver of the conscientious objector claim so as to avoid an investigation and hearing required by the statute is also a denial of a full and fair hearing. The Department of Justice attempted to avoid an investigation and a hearing required by Congress in this case through the scheme of having an agent approach the petitioner with a prepared waiver and request him to sign it since he was basing his claim for exemption on the ministerial status.

The illegal policy of representing to ignorant registrants by government agents, who are lawyers, that it is advisable to sign waivers of the conscientious objector claims where the main claim of the registrant is the ministry is a fraud and misrepresentation. It is an illegal denial of due process of law.

It is respectfully submitted that the holding of the court below on this question involved in the case is of very great public importance. It is important enough for this Court to grant certiorari. The petition should be allowed on this ground.

II.

Section 1624.1 of the Selective Service Regulations gives the registrant the right to an oral hearing upon personal appearance. The draft board denied the proper request in writing. The fact that the request was that the board give him a hearing in Austin instead of Houston, the location of the board, was mere surplusage. The letter dated August 30,

1950, was a proper written request for a personal appearance.

In a letter appealing from the classification dated August 30, 1950, the petitioner requested a personal appearance. (See Defendant's Exhibit 10.) [36] In the letter he stated that it would not be convenient for him to come to Houston and he requested that the local board arrange for him to appear before a board in Austin. Under the regulations it was impossible for the local board of petitioner to arrange for him to appear before a board in Austin. It was the duty of the local board to inform the petitioner of the fact that he could not appear before a board in Austin but that if he wanted a personal appearance as he requested and as he was entitled to he could appear before the local board in Houston. It was beyond the authority of the local board to send the file of the petitioner to the appeal board without first granting the petitioner an opportunity to appear in person. The petitioner's request for a personal appearance was a lawful request. The request did not become void and of no force and effect purely because the petitioner asked for the right to appear before a local board in Austin. It was a valid request for personal appearance. The request was not answered or complied with by the local board. Their failure to comply with the request constituted a violation of the procedural rights of the petitioner to due process of law which is an important question that ought to be decided by this Court.

The holding of the court approving the denial of the personal appearance conflicts directly with *Davis* v. *United States*, 199 F. 2d. 689 (6th Cir.). In that case Davis was refused the right to discuss his case after he appeared before the board. The court held that the denial of the right to discuss his classification and argue his case before the board was a violation of the regulations. The holding in the court below also conflicts with the holding of the court in *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir.). In that case,

the defendant filed a written argument upon his personal appearance. The board regarded the written argument as an appeal. The board forwarded the case to the appeal board. The court, in that case, said that the "Board was not entitled to treat it as an appeal". Later, the court remarked concerning sending the case to the appeal board thus:

> "Just how it got to the Appeal Board is not entirely clear from the record, but apparently the Local Board did treat Zieber's 'Written Argument' as an appeal and did send Zieber's cover sheet or file to the Appeal Board."

The Government may argue that, because Neal stated in his letter requesting a personal appearance he appealed "his classification", the board was justified in sending his case to the board of appeal. Not only is this argument rejected in *United States* v. *Zieber, supra,* it is also condemned in *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.). In that case, Stiles took a written appeal, then he filed a written request for personal appearance. The court said:

> "Meanwhile on January 21st, after his request for a personal interview had been made but before it had been granted, Stiles signed the appeal form printed on the back of his original questionnaire . . . It is true that Stiles did take an appeal before his personal appearance and that his file as sent up to the board did contain the written information which he submitted at the time of his appearance. But . . . he was deprived of the right to file a statement for the board of appeal based upon matters developed in the course of his personal appearance. Moreover, the order for his induction was in direct violation of § 625.3 since it was issued after he had requested a personal appearance but before notice

of his classification anew had been mailed to him as required by § 625.2 (d)."

While it may not have been actually necessary to take an appeal simultaneously with the request for personal appearance, it is easy to understand why uneducated registrants, uninformed in the law, can be mislead into believing it is necessary to take an appeal when requesting a hearing. The wording of the notice of classification received by the registrant carried on it a printed notice that is somewhat vague and could be interpreted to mean that it is necessary for a registrant to take an appeal simultaneously with the request for personal appearance within ten days. The classification card of the petitioner was received into evidence and it shows this notice. Even if this exhibit were not before the Court, this Court could take judicial notice of the selective service forms, inasmuch as they have been made a part of the Selective Service Regulations.

The statement by Neal that he "appealed his classification" is by no means unusual. It is the usual practice of registrants to write a joint letter for appeal and personal appearance. Whether this stand is required or not, the letter did contain a request for a personal appearance. The request being made in this way did not at all deprive Neal of his procedural rights. It did not in any way justify or excuse the board in failing to notify him that his file was being sent to the board of appeal. Some sort of notice of forwarding the file to the board of appeal was commanded by the regulations so that Neal could argue his case in writing extensively before the appeal board pursuant to Section 1626.12 of the regulations.

The importance of this question is demonstrated in the holdings in *United States* v. *Laier*, 52 F. Supp. 392 (N. D. Calif. S. D.); *United States* v. *Peterson*, 53 F. Supp. 760 (N. D. Calif. S. D.); and *United States* v. *Romano*, 103 F. Supp. 597 (S. D. N. Y.). In all three of these cases the courts held that the denial of the right to a personal appearance

was a denial of due process. The denial invalidated the draft board order. Compare *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.), with *Martin* v. *United States,* 190 F. 2d 775, where Judge Parker said:

> "We agree that failure to accord a registrant the rights provided by these provisions of the regulation would invalidate the action of the draft board and concur in what was said by the Court of Appeals of the Third Circuit in *United States* v. *Stiles,* 3d Cir., 169 F. 2d 455, in that regard."—190 F. 2d 775 at page 778 (4th Cir.).

See also *Knox* v. *United States,* 200 F. 2d 398 (9th Cir.).

It has been held that if there is no hearing, if the evidence is not considered or if the registrant is not given the right to discuss his case, it constitutes a denial of due process of law so as to make invalid the draft board proceedings. Ex parte *Stanziale,* 138 F. 2d 312 (3rd Cir.). If the registrant is not given this right, his constitutional liberties are violated. (Compare *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.).) The steps to be taken as a condition precedent to induction must be strictly followed. Otherwise the order to report is void.—See *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876 (8th Cir.).

> "There must be full and fair compliance with the provisions of the Act and the applicable regulations."—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.).

It may be asserted by the Government that the *de novo* classification by the district appeal board and the National Selective Service Appeal Board cured the error and made harmless the denial of due process. A violation of due process by a local board cannot be cured by a determination by an appeal board. (See *United States* v. *Romano,* 103 F.

Supp. 597 (D. C. N. Y. S. D. 1952).) There the district judge who rendered judgment in *United States* v. *Fry,* 103 F. Supp. 905 (S. D. N. Y. 1952) referred to the holding in *United States* v. *Laier,* 52 F. Supp. 392 (D. C. Calif. N. D. S. D. 1943). He stated that the judge in that case "explicitly rejected the Government's contention in that case that the appeal the registrant took to the Board of Appeals cured any error the local board might have committed".

The same conclusion was reached by Judge Brennan in *United States* v. *Graham* 108 F. Supp. 794 (D. C. N. Y. N. D. 1952). (See also *United States* v. *Peterson,* 53 F. Supp. 760 (D. C. Calif. N. D. S. D. 1944).) The same holding was made in *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.).

The Government may rely upon the confusion of the issue by the court below. That court failed to recognize the vital distinction between a personal appearance and the gratuitous hearing ordered by the state director on the request to reopen. The personal appearance is a matter of right. Reopening a case after it has gone to the appeal board is entirely a matter of discretion. The court below held, however, that the hearing accorded the petitioner after he had gone to the appeal board and lost cured the error. The court held that the hearing given him when he asked that his case be reopened and that he be given a fresh start was in compliance with the regulations. A hearing on the request to reopen is not at all synonymous to the hearing upon personal appearance. Section 1624.1 is the regulation on personal appearance. Section 1625.1 is the regulation on reopening. There is as much difference between the two procedures provided in these two regulations as there is between day and night. The error of the court below can be illustrated by reference to judicial proceedings. It is just as though a trial court had not allowed an oral argument in judicial proceedings and then allowed an argument after the case had returned from the appellate court with an order of affirmance. Here Neal's case had gone all the way to the district appeal board. It was then that the director

asked the local board to consider the request to reopen Neal's case. The analogy just made is identical and in point. The hearing on the request to reopen did not in any way cure the flagrant error of denying the personal appearance properly requested by Neal in writing.

It should be remembered that the petitioner had the right to argue his case before the appeal board. Section 1626.12 gave Neal the right to extensively argue his case in writing before the appeal board. Had the board granted his request for personal appearance as required by Section 1624.1 of the regulations and then notified him of the action taken following personal appearance as required by Section 1624.2 (d) of the regulations and observing the command as of Section 1624.3 of the regulations, Neal would have been duly notified of the adverse classification and could have exercised his right to argue the case on appeal to the appeal board. Section 1626.12 reads:

> "Statement of Person Appealing.—The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

Petitioner was harmed by being deprived of a very substantial right to make this argument upon his appeal through receiving no notice from the board after the hearing. This he could do only by making the written statement. This was a crucial and vital right. It was not cured by the the right to argue his case before the appeal board in the

appeal statement. The hearing he had was after the appeal board proceedings.

Had Neal taken an appeal to the appeal board, the situation might be different. He would be charged with notice that his case had been forwarded to the appeal board had he taken an appeal.—Compare *United States* v. *Zieber,* 161 F. 2d 90 (1947), with *United States* v. *Fry,* 202 F. 2d _____, March 11, 1953 (2d Cir.).

While he had filed a written notice of appeal when he requested a personal appearance, as was done by Stiles, Neal still had the right to prepare and file an appeal statement in writing that submitted to the board of appeal new and additional evidence and arguments. Also he had the right to incorporate in this statement a memorandum of the new and additional evidence about his change of status.

In the case of *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.), Judge Maris stated:

> "Here it will be seen that there is a plain direction not to induct a registrant who has requested a personal appearance until 10 days after he has again been classified as provided by § 625.2 (d) and after notice of such classification has been mailed to him. . . . Moreover § 625.2 (e) gives such a registrant the same right of appeal from such new classification as in the case of an original classification. Under § 627.12 an appellant may file with his appeal for transmittal to the board of appeal a statement 'specifying the respects in which he believes the local board erred' and directing attention 'to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight'. This highlights the importance to a registrant of the right to appeal after his personal appearance and in the light of his oral discussion with the members of the local board. For his discussion with the board members

> may well clarify in his mind the basis for the board's action and thus provide him with relevant material for his statement to the board of appeal which he could not possibly have had in mind if his sole appeal had to be perfected before his personal appearance. It need hardly be said that this right of appeal after appearance may thus prove of the greatest importance to a registrant."

It was never contended at any time before the court below that the oral hearing of March 7, 1951, was a personal appearance required by Section 1624.2 (b). Why did the court below discuss Section 1624.2 (b) in connection with the testimony given by him? There was no personal appearance hearing. The personal appearance requested was denied by the board immediately following his first classification. This was by the board's sending his case to the appeal board. It refused to grant a personal appearance asked for.

Why did the court below confuse the issues by stating in the opinion that the hearing complied with Section 1624.2 (b) of the regulations, when that regulation was not even argued, briefed, urged or involved on the reopening hearing? Did the court want to state and make its own case on this point for decision? This error proves very plainly that the court misunderstood the entire point made by Neal in his brief and upon the oral argument.

Neal's point was that he wrote for a hearing on personal appearance. This was denied when his case was sent to the appeal board without a hearing. Never has he contended (as implied by the court below) that the board on March 7, 1951, denied his rights on a personal appearance. His rights on personal appearance had already been passed up when the board sent the case to the appeal board.

What Neal did contend was that the March 7, 1951, hearing was ordered by the state director. Although the hearing was not required by the regulations, it was ordered by the director to determine whether the board should reopen the

case. Should the board start all over again after it had gone all the way through the appellate procedure, without a personal appearance? That was the question put to the board by the state director. The hearing ordered by the director was not a substitute for a personal appearance.

Had it been a personal appearance hearing, Neal would have had the right to an appeal from the action following the hearing of March 7, 1951. (See Section 1624.2 (d) of the regulations.) But it was not such. He had no right of a new appeal, which he would have had if it were a personal appearance hearing. It was a hearing *not provided for* in regulations. It was ordered by the state director gratuitously and without authority in the regulations to determine whether the board would reopen the case. The reopening could have been done under Section 1625.2 of the regulations. But there is no provision in it for a hearing on the request. It is plain that the court has changed the regulations and confused the procedure on a personal appearance with the practice on a request for a reopening of a case.

It seems that another statement in the opinion of the court below is entirely out of place and foreign to the law of this case. It is new procedure invented by the opinion! The court below said: "What has already been shown in Note 1 demonstrates that the board accorded appellant a hearing which complies with the regulations, and which satisfies the requirements of due process." [145]

The hearing that he had (as before stated) plainly was not required by the regulations. There can be found (as above stated) no requirement of a hearing on a request to reopen. Now, how can the court below say that he got the hearing required by the regulations on the request to reopen when it was not required by Section 1625.2 of the regulations? How can the court below say that he had a proper personal appearance when none was granted under Section 1624.2 of the regulations? That request was com-

pletely denied! There was no hearing of any kind on personal appearance.

It is respectfully submitted that the holding of the court below in this point is in direct conflict with *Davis* v. *United States,* 199 F. 2d 689 (6th Cir. 1952). The question of the denial of the personal appearance is also a highly important question of national interest. It ought to be determined by this Court. The writ of certiorari should be granted on this ground.

III.

Section 1625.1 of the Selective Service Regulations requires the registrant to keep the local board informed of any facts that would change his status. Section 1625.2 provides for a reopening when facts are presented that had not been considered "when the registrant was classified, which, if true, do justify a change in the registrant's classification".

The regulations contemplate a late request for a reopening of the case because Section 1625.14 provides that even an order to report for induction shall be canceled when the request to reopen is granted. The spirit of this regulation was carried out in the case styled In re *Abramson,* 196 F. 2d 261 (3rd Cir.). In that case registrant's wife became pregnant after he had exhausted his remedies and shortly before the order to report for induction was mailed. The court held that the registrant should be discharged from the armed forces.

The reason for the regulation authorizing the reopening by the local board is obvious. Suppose a registrant may be liable for training and service at the time of registration, at the time of filing the questionnaire and at the time of the final classification. But at the time of the order to report for induction he had been inducted into some governmental office to which he had been elected, entitling him to deferment. In such a situation it would be plain that the registrant would be entitled to a reopening of his classifi-

cation. A failure or refusal to reopen in such a situation would be obviously unreasonable, arbitrary and capricious.

This argument is supported by the holding in *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.). See the quotation from the court in that case which is directly in point here, appearing in the petition for the writ of certiorari in the companion case of *Dickinson* v. *United States* at page 33.

When petitioner moved from Houston to Austin and at the time he was given the first I-A classification by the local board, when it reopened his case following the signing of the waiver of the conscientious objector claim, he had changed the amount of time devoted to secular and ministerial work. He was from that date until the present devoting only 20 hours per week (instead of 36 hours) to secular work and 75 hours to the ministry (instead of 25 hours).

This substantial change that was in existence at the time of the first I-A classification by the local board was not known to the local board until the state director wrote the board about reopening his case following the classification by the appeal board. Petitioner desired to present his case to the local board upon a personal appearance, at which this vital change would have become apparent. He ignorantly requested that a local board in Austin instead of his local board in Houston give him a personal appearance. Because of this unfortunate move he did not have a personal appearance, inasmuch as the local board did not write him that he could not have an appearance at Austin instead of Houston. Because of this the local board did not know of his change of status until it received the letter from the state director written in behalf of the petitioner.

Whatever may be thought of the application of *Martin* v. *United States,* 190 F. 2d 775 (4th Cir.), to the case of petitioner at the time of the filing of his questionnaire, it certainly did not apply from the time that petitioner moved from Houston to Austin, which was before he was first classified I-A by the local board in Houston. His changes

in the time devoted to the ministry and secular work removed any doubts about the ministry's being his vocation. It was then (and has ever since) unquestionably been his vocation. This situation should have been considered by the local board upon the occasion of his appearance before them in March, 1952, as sufficient to justify a reopening. Their refusal to reopen and to stay the order of induction was arbitrary and capricious. It worked a great injustice upon the petitioner which should be rectified by this Court.

Upon the occasion of the hearing on the request to reopen facts were presented to the local board which established as a matter of law that the vocation of the petitioner was that of the ministry. It was the same as though the petitioner had shown that he had become inducted into an office of government which entitled him to deferment, or the same as showing that his wife had become pregnant before the induction order had been mailed to him as was shown in the *Abramson case,* 196 F. 2d 261 (3rd Cir.). The local board should have followed the spirit of the regulations and judicial pronouncement in *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.), reopened the case and stayed the enforcement of the induction order issued to petitioner.

It is respectfully submitted that the court below in making its holding determined an important question of federal law which has not been, but should be determined by this Court. For this reason the writ of certiorari should be granted in this case.

IV.

Section 6 (g) of the Selective Service Act of 1948 provides for the exemption of ministers of religion. Section 16 (g), (1), (2) and (3) provides the definition of the term "minister of religion".

The record in this case shows petitioner pursued the ministry prior to his final classification, during the time

his case was before the district appeal board and before the hearing on request to reopen. There was no evidence whatever before the board or before the court below that he preached irregularly or incidentally to some secular vocation. The undisputed evidence shows that he was engaged in the ministry as a full-time missionary and assistant presiding minister of a congregation of Christian people. It establishes that he preached from the pulpit three or more times monthly in addition to devoting more than one hundred hours per month to preaching in the missionary field.

The undisputed facts show that petitioner was preaching his religion as an ordained minister of the gospel, which was his vocation rather than his avocation. A vocation is defined by Webster's *New International Dictionary of the English Language,* 2nd Edition, Unabridged, 1950, on page 2854 as follows:

> "Vocation (L. *Vocatio* a bidding, a calling, invitation, fr. *vocare* to call; cf. F. vocation. 1. A calling; a summons; a call; specif.: a. *obs.* Convocation, as of an assembly. b. A calling to a particular state, business, or profession. 2. Regular or appropriate employment; calling; occupation; profession; as, to change one's *vocation.* 3. The members of a particular calling or profession, collectively. *Rare.* 4. *Theol.* a. A calling to the service of God in a particular station or state of life, esp. in the priesthood or religious life, as shown by one's fitness, natural inclinations, and, often, by conviction of a Divine invitation. b. The station or state of life to which one receives such a calling. c. An official invitation to a particular ecclesiastical office, as a pastorate.
>
> "Syn.—vocation, avocation, hobby. Vocation denotes one's regular calling or profession; an Avocation is something which calls one away from one's

> ordinary pursuits; the word commonly suggests a subsidiary or minor occupation, and its employment in the sense of *vocation* is contrary to good usage. . . . A Hobby is a favorite avocation; the word often connotes a mildly indulgent attitude towards what is regarded as extreme. . . . See OCCUPATION."

It is true that the record also disclosed that the petitioner engaged in secular work for twenty hours each week. The record, however, showed that he devoted seventy or more hours per week as a minister to the carrying out of his duties as a minister than he devoted each week to his secular work. The secular work performed by petitioner was incidental to his vocation as a minister. In fact he devoted as much time, if not much more, each week to the performance of his ministerial duties than do the clergy recognized by the draft board that denied him his claim for classification as a minister. The ministry was his vocation. His secular work twenty hours per week was his avocation.

There is no question that petitioner, a full-time pioneer, was a regular and duly ordained minister of religion as defined in Section 6 (g) and Section 16 (g) (1), (2) and (3) of the act. He did not irregularly or incidentally teach and preach the doctrines and principles of Jehovah's witnesses. He regularly, as a vocation, taught and preached the principles of religion and administered the ordinances of public worship as embodied in the creed or principles of the church known as Jehovah's witnesses. His preaching work was his customary vocation.

The incidental performance of secular work as an avocation by petitioner does not disqualify him to be classified as a regular or ordained minister of religion. The term "regular minister" used in the regulations has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be perform-

ing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. Ex parte *Cain,* 39 Ala. 440-441.

It is to be observed that the regulations use the word "customarily". Customary, the word from which it is derived, is synonymous with "usual" and "habitual". It does not mean continuously. It is not synonymous with continuously, uninterruptedly, daily, hourly, or momentarily. The *Century Dictionary* defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week he is a regular minister of religion under the act and regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain him is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks,

bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support, is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily preaches.

The court below does not tell us exactly what particular part of the evidence it relied on for refusing to hold that there was no basis in fact for the classification. The court merely says "the picture made by the foregoing facts presents ample basis for the exercise of informed discretion by the board". [147] In discussing the contention of petitioner and rejecting it, the court relied on several factors. It emphasized the youthfulness of Neal. This point has been answered fully in the discussion of the reasons for granting the writ in *Dickinson* v. *United States,* a companion case to this one.—See the petition at pages 27-31.

The court then says that Neal became a full-time minister "1½ months before he registered" under the act. [145] Emphasis is placed upon his devoting 162 hours per month at that time to secular work. The reliance which was placed by the court upon this factor for holding that Neal was not arbitrarily classified is in direct conflict with *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.). In that case the court said:

> " . . . We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, with a non-exempt status at the time of registra- should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5 (h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by refer-

> ring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

It is interesting to observe the court found that at the time Neal was classified by the local board, the district appeal board and the National Selective Service Appeal Board, "his secular work had been reduced to about 20 hours per week (or about 90 hours per month) and his ministerial work increased to about 300 hours per month." [145-146].

Just why the court below felt it was relevant to dig into the files of Neal and turn up irrelevant and prejudicial matter is difficult to understand. The court said that Neal "was twice convicted of stealing". Neal explained that these were offenses committed by him while he was a minor and that he never spent any time in jail. He also pointed out that this was before he became one of Jehovah's witnesses. [63-64, 68] (See Defendant's Exhibit 1, page 6.) The court then went deeply into irrelevant and prejudicial matters and turned up for speculation the fact that Neal showed in his questionnaire that he had contracted gonorrhea. [65] His testimony showed that his wife gave him the disease which she had acquired through adultery. He

showed in his questionnaire that he was separated from his wife. He testified at the trial that he had actually divorced his wife for adultery. [68-69] The undisputed evidence seemingly excuses Neal for any wrong-doing that resulted in his acquiring the disease. Yet the court below suggests that it was "associated with immorality" and that the petitioner "claimed" he contracted the disease from the adulterous wife. Why the court would deal with such an immaterial matter in such a suggestive way is difficult to understand. How and why these two factors had any relevancy whatever to the question of law to be determined is not seen. It demonstrates that the court below was grasping for anything that it could get its hands on in order to rule against the petitioner.

The court below then states that petitioner "claimed" that he was authorized to preach sermons from the pulpit. The court then says that Neal held no religious service at any particular place. There appears in the file a letter dated February 7, written to the local board, showing that he was assistant presiding minister of the Rosewood congregation of Jehovah's witnesses in Austin, Texas. Attached to this list was a certificate signed by T. J. Sullivan, Superintendant of Evangelists of the Watchtower Bible and Tract Society, showing that Neal had been appointed a pioneer and authorized to establish churches, preach the doctrines of Jehovah's witnesses, perform the rites and ceremonies of baptism, burial, etc. This certificate is dated January 27, 1951.

The evidence, therefore, showed that Neal performed functions in a church house in the same way as do the orthodox clergy. The court said, however, that his ministry was confined to "passing out religious magazines published by Jehovah's witnesses preaching from house to house when not engaged in secular work and delivering Bible lectures at infrequent intervals". [146] The reliance by the court below upon this evidence as a basis in fact is a holding

directly in conflict with *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.). In that case the court said:

> "Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member * * * '. The latter 'is a man who has been ordained in accordance with the ceremonial, ritual or discipline of a recognized church * * * '. The Selective Service System has even more broadly defined the term 'regular minister of religion'. Under the heading, 'Special Problems of Classification' (Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated: 'The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or affect its purpose or its goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. * * * He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister

> of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. * * * To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant.'"

The court below held that it was necessary to find that the denial of the claim for exemption as a minister of religion was so arbitrary and capricious "as to deprive appellant of due process". This holding of the court below is in conflict with the holding by this Court in *Estep* v. *United States,* 327 U. S. 114, where it was held that the issue to be determined was whether there was basis in fact for the classification. It was held that if there was no basis in fact the court exceeded its jurisdiction.

The court below also held that the draft boards had the right to see and hear Neal "in person". [147] The right of observation on the part of the board is not within itself a basis in fact for the classification. (See the discussion on this point appearing at pages 27 to 28 in the petition for writ of certiorari filed in the companion case *Dickinson* v. *United States.*) The court below, incidentally, makes a statement that is absolutely untrue. It says that the "state appeal board had the advantage of seeing and hearing the appellant in person". Never does a registrant have the right to appear before a state appeal board. This is an appellate agency. It never sees the registrant. It decides the classification upon the papers alone. There is no regulation that even provides for a personal appearance before the state appeal board. This inaccurate statement by the court below is typical of the other erroneous statements of fact and law that appear in the opinion. It is respectfully

submitted that the holding of the court below on this point is in direct conflict with *Hull* v. *Stalter, supra.* It is not supported by *Cox* v. *United States,* 332 U. S. 442. (See pages 40-44 of the petition for writ of certiorari filed in the companion case of *Dickinson* v. *United States.*) The holding on this point also involves an important point of federal law that ought to be determined by this Court.

V.

Upon the trial there was a sharp conflict in the testimony between Neal and the special agent of the Federal Bureau of Investigation as to what was said by the agent to induce the petitioner to waive his conscientious objector status. [50-51, 74-76, 99-100] The trial judge stated that a sharp conflict existed here. [88]

A confidential written report on the taking of the written waiver was made by the agent. [81-82, 88] A proper demand was made for the production of the report to impeach the agent on cross-examination. [89-92, 94-96] The demand was refused with an exception. [81-88, 91-92, 94-96]

While the court below did not expressly rely upon Order No. 3229 of the Attorney General, which prohibits the disclosure of such reports, it will undoubtedly be urged by the Government upon this appeal in answer to this argument.

While it has been held that a party does not have the right to delve into and pry into all the records of an administrative agency or examine secret reports not directly relied on (*St. Louis Southwestern Ry. Co.* v. *Interstate Commerce Commission,* 264 U. S. 64; *United States* v. *Abilene & S. Ry. Co.,* 265 U. S. 274), it has also been held that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial.

> "If that were not so, a complainant would be helpless, for the inference would always be possible

> that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."—Mr. Justice Cordozo in *West Ohio Gas Co.* v *Public Utilities Commission,* 294 U. S. 63, 68, 69.

The petitioner expected to impeach the adverse parts of the F.B.I. report and show that there was no basis in fact for the denial of the conscientious objector classification and that the Selective Service System and the Department of Justice exceeded their authority and jurisdiction.

The holding of the court below on this point is directly in conflict with that in *United States* v. *Krulewitch,* 145 F. 2d 76 (2d Cir.). That case is directly in point with that here.

That case involved a violation of the Mann Act. It developed that the prosecuting witness had made a written report to the Department of Justice as to what occurred. Upon the trial a demand was made for a production of the document for the purpose of cross-examining the witness and impeaching her, which is the same situation we have here. The court refused the request. The court of appeals held that it was prejudicial error. The court said:

> "But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution, and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."—See 145 F. 2d at page 79.

A proper foundation had been laid by the petitioner to call for the F.B.I. report made by the agent to be used to impeach the testimony of the agent. He did not remember

all the contents of the three-page report that contained a copy of the waiver signed by petitioner. He denied the statements made by the petitioner as to the procedure followed in getting the waiver from petitioner. The testimony of the petitioner was consistent with the policy fixed by the Attorney General for the agent to follow in Circular No. 3461. (See Appendix A to this brief.) The testimony of the agent and his failure to remember made his testimony inconsistent with the instructions of the Attorney General. A production of the written report would very likely have established that in taking the waiver he followed the instructions of the Attorney General. This would have impeached the agent and corroborated the petitioner.

It has been held that when a witness neither directly admits nor directly denies the existence of inconsistent statements made by him in writing it is competent to prove the prior statement.—*People* v. *Preston,* 341 Ill. 407, 173 N. E. 383.

The use of the report for the purpose of impeachment of the agent of the Federal Bureau of Investigation is supported by *Chicago, Milwaukee and St. Paul Railway Co.* v. *Artery,* 137 U. S. 507. The Court said:

> "We think the circuit Court erred in laying it down as a rule, that a written statement signed by a witness and admitted by him to have been so signed cannot be used in cross-examining him as to material points testified to by him. . . . The written statement having been presented to the witness, and he having admitted that what purported to be his signature to it was his signature, it was perfectly open to him to read it, and he could have been inquired of as to the circumstances under which it was taken down and signed, so as to advise the jury as to its authenticity and the credit to be given to it."—137 U. S. at pages 519 to 520.

The truth of the matter could be established only by a production of the report made by the agent. The trial court refused to force the production of the report, leaving us in a pit of quandary as to the truth. This was prejudicial error under all the circumstances of this case. It is respectfully submitted that the judgment of the trial court should be reversed and the cause remanded for a new trial because of this error of the trial court.

The ruling of the court below puts this Court in the same position that the Court of Appeals for the Second Circuit was placed in, in *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.). In that case the court said:

> "We cannot of course know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial, for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U. S. C. A. § 391."—142 F. 2d at page 506.

It is for the appellate federal courts to have the final say on whether evidence is material or immaterial. This cannot properly be done on review of rejected evidence without a proper bill of exception, which requires an offer of proof. *New York Life Insurance Co.* v. *Doerksen,* 75 F. 2d 96, 101-102 (10th Cir.). The right to make the offer is also explicitly provided for in Rule 43 (c) of the Federal Rules of Civil Procedure. Among other things the rule provides that on the exclusion of evidence "the examining attorney may make a specific offer of what he expects to prove by the answer of the witness."

This point was also recently considered in *Downie* v. *Powers,* 193 F. 2d 760 (10th Cir.), in which Judge Murrah said:

> "Appellants also complain of the refusal of the trial court to allow them to make offers for the record of excluded testimony. Rule 43 (c), 28

USCA, provides that 'in an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the witness. The court may require the offer to be made out of the hearing of the jury. . . . '

"The obvious purpose of this rule is to permit 'the examining attorney to make such record that an appellate court can determine whether there was reversible error in excluding the question'. Moore's *Federal Practice,* Vol. 3, p. 3076. If the significance of the excluded evidence is not obvious, the offer of proof must be made to preserve the question on appeal. *Hoffman* v. *Palmer,* 129 F. 2d 976; *Patton* v. *Lewis,* 146 F. 2d 544. Not having a record of the proffered testimony we cannot judge its competence. From the questions propounded, however, we are able to say that much of the testimony sought to be elicited was clearly incompetent to prove any of the issues on trial. The requirements of the rule are but a codification of prior and accepted practice. There may be such flagrant abuse of privileges of the rule as to justify curtailment of the proffers in the interest of the administration of justice. But, lest our acquiescence be construed as giving consent to defiance of the Rule, we suggest that the spirit of its mandate cannot be ignored."

It is respectfully submitted that the holding of the court below on this point is directly in conflict with decisions cited. It is, moreover, a determination upon an important question of federal law that ought to be decided by this Court.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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May, 1953.

Appendix A

DEPARTMENT OF JUSTICE
Washington 25, D. C.

September 28, 1943

CIRCULAR No. 3461
SUPPLEMENT NO. 9

TO ALL UNITED STATES ATTORNEYS AND SPECIAL ASSISTANTS TO THE ATTORNEY GENERAL, DESIGNATED AS HEARING OFFICERS UNDER SECTION 5 (g) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940

Re: Conscientious Objector Cases Involving Appeals for Classification in Class IV-D.

Since the number of conscientious objector cases involving appeals for classification in Class IV-D is constantly increasing, and because the classification claims in these cases are confusing, it is deemed desirable to formulate a definite procedure and policy to govern the disposition of such cases.

Section I: CLAIMS FOR DEFERMENT AND EXEMPTION MADE IN SUCH CASES.

(1) Aside from any other claims for deferment (generally, Class II or Class III), the ordinary Selective Service case of this type also contains two claims for exemption —one for Class IV-D as a minister of the Gospel (Sec. 622.44, S. S. R.), and one for Class IV-E as a conscientious objector to both combatant and noncombatant military service (Sec. 622.51, S. S. R.).

(2) The registrants in these cases are generally ultimately classified in Class I-A, Class I-A-O, or Class IV-E by their Local Boards, and thereupon promptly appeal for classification in Class IV-D as ministers of the Gospel.

(3) Many registrants who specifically appeal for classification in Class IV-D have also indicated claims for exemption as conscientious objectors. In certain of these cases, the registrants desire to withdraw their conscientious objector claims and rely solely upon their ministerial claims. While such withdrawals must necessarily be permitted, since a registrant may not be classified as a conscientious objector if he does not desire such a classification, it is important that care be exercised in determining whether or not such withdrawal has, in fact, been made. When it is determined that there has been a withdrawal of the conscientious objector claim, the Department of Justice has no further function to perform in connection with the appeal. It may be noted that many Jehovah's Witnesses may be included in this category of cases.

Section II: PROCEDURE TO BE FOLLOWED BY UNITED STATES ATTORNEYS.

(1) In the normal case of this type, the Board of Appeal, after compliance with the provisions of Section 627.25 of the Selective Service regulations, will refer the case to the United States Attorney for investigation and hearing.

(2) The Board of Appeal has the right and the authority to refer the case to the United States Attorney, *even though the registrant has been classified as a conscientious objector by his Local Board, even though the registrant bases his appeal exclusively on his claim for classification in Class IV-D.* (See Memorandum for United States Attorneys and Hearing Officers, dated December 22, 1942).

(3) After determining that the Selective Service file is in order and that the Department has jurisdiction in

the case, the United States Attorney should examine the file to ascertain whether the special procedure set forth in Section II of Supplement No. 7 to Circular No. 3461, dated March 1, 1943, is applicable.

(4) If the file is in his possession after disposition of whatever action is taken under Section II Supplement No. 7 to Circular No. 3461, the United States Attorney should thereupon forward it to the Field Office of the Federal Bureau of Investigation for the usual investigation prior to hearing. (See, however, Section III (7) and (4), post.)

Section III: PROCEDURE TO BE FOLLOWED BY THE FEDERAL BUREAU OF INVESTIGATION.

(1) The file should be photostated in the usual manner.

(2) If the registrant is appealing for classification in Class IV-D, in addition to having claimed to be a conscientious objector, the inquiry contemplated by Section 5 (g) of the Selective Service Act may be initiated by an interview with the registrant. By such interview, it will be possible to determine whether the registrant desires or will accept a conscientious objector classification before the usual investigation and hearing are conducted. The registrant may be informed that his claim for classification in Class IV-D, or any other deferred class has already been denied by both Local and Appeal boards, and his case has been referred to the Department of Justice for inquiry and hearing solely on his claim for exemption as a conscientious objector. The registrant should be informed that the Department of Justice has no advisory jurisdiction over any classification except those relating to conscientious objectors, and any hearing accorded to him after the investigation would be confined solely to the issue of his conscientious objector claim.

(3) If the registrant clearly and unequivocally states that he does not desire or will not accept a conscientious objector classification, regardless of the granting or de-

nial of classification in Class IV-D, and that he wishes to withdraw his claim for classification as a conscientious objector, the registrant should be given an opportunity to sign a statement to that effect.

(4) The statement signed by the registrant should be substantially in the following form:

> I hereby state that I am not a conscientious objector and voluntarily withdraw my claim for classification as such. In appealing from my classification of my Local Board, I claimed classification in Class IV-D as a minister, and relied solely upon that claim, and do not wish or claim to be classified in Class IV-E or Class I-A-O. I understand that by signing this statement no further consideration will be given to my conscientious objector claim.

(5) If the registrant does not desire to sign a statement withdrawing his claim, no attempt should be made to persuade him to do so, and at the conclusion of the interview, the investigation should proceed in the usual manner so that the case may be referred to the Hearing Officer in due course.

(6) If the registrant signs such a written withdrawal of his claim no further inquiry need be conducted. The original statement of withdrawal, or a photostatic copy thereof, should be inserted in the registrant's Selective Service File (if still in the possession of the Bureau), and the file returned to the United States Attorney, or transmitted to the United States Attorney for insertion in the original file (if the original file has been returned to the United States Attorney after photostating).

(7) The original Selective Service file containing the signed statement of withdrawal should then be returned to the Board of Appeal by the United States Attorney with a letter of transmittal stating that, in view of the

written withdrawal of the conscientious objector claim, the Department of Justice has no further jurisdiction in the case, and the Board of Appeal should proceed with the classification of the registrant as if no conscientious objector claim had been filed by him. A copy (preferably a duplicate original or a photostatic copy) of the statement of withdrawal should be retained in the registrant's file in the office of the United States Attorney.

Section IV: PROCEDURE TO BE FOLLOWED BY HEARING OFFICERS.

(1) If a case in this category should be referred to the Hearing Officer, the usual notice for hearing should be forwarded to the registrant.

(2) If in response to such notice the registrant should reply that he is not appealing as a conscientious objector, or that he desires classification only in Class IV-D, the Hearing Officer should communicate with the registrant and furnish him with the statement set out in Section III (4) above for his signature and return thereof to the Hearing Officer.

(3) If, however, the registrant appears for hearing and at such hearing states that he does not desire a conscientious objector classification, regardless of the granting or denial of his claim for classification in Class IV-D, and that he is withdrawing his claim for classification as a conscientious objector, the Hearing Officer may request the registrant to sign a statement to that effect, which should be substantially the same as that set out in Section III (4) above, and if such statement is signed, the hearing may thereupon be terminated.

(4) If the signed statement of withdrawal is received by the Hearing Officer pursuant to either Paragraphs (2) or (3) above, the Hearing Officer should return the original Selective Service file together with the signed state-

ment of withdrawal to the United States Attorney in the same manner as outlined in Section III (6) above.

(5) If the registrant does not desire to withdraw his conscientious objector claim in writing at the hearing, the Hearing Officer should proceed with the hearing, prepare his report and recommendation on the conscientious objector claim, and transmit it with the original Selective Service file to the Assistant to the Attorney General in the usual manner.

Any question which may arise concerning the foregoing procedure or any question concerning the construction of any signed statement which may be furnished by any registrant, may be referred by the United States Attorneys or the Hearing Officers to this office for advice.

Please acknowledge receipt of this circular.

LINTON M. COLLINS
Acting Assistant to the Attorney General

DEPARTMENT OF JUSTICE
Washington 25, D. C.

CIRCULAR No. 3461

August 4, 1944

TO ALL UNITED STATES ATTORNEYS AND SPECIAL ASSISTANTS TO THE ATTORNEY GENERAL, DESIGNATED AS HEARING OFFICERS UNDER SECTION 5 (g) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940

Re: Return of Selective Service files to Boards of Appeal after withdrawal of conscientious objector claims.

The correspondence between United States Attorneys and the various Appeal Boards of the Selective Service System in connection with conscientious objector cases wherein the registrants voluntarily withdraw their claims for classification in Class IV-E and Class 1-A-O indicates that many United States Attorneys return the files and suggest that the Boards of Appeal forward the signed statement of withdrawal to the Local Board for consideration of the new evidence.

Your attention is invited to the fact that Section III (7) of Supplement No. 9 to Circular No. 3461 dated September 28, 1943, instructs the United States Attorneys to return the file, together with the signed statement of withdrawal, to the Board of Appeal.

> " . . . with a letter of transmittal stating that in view of the written withdrawal of the conscientious objector claim, the Department of Justice has no further jurisdiction in the case, *and the Board of Appeal should proceed with the classification of the*

registrant as if no conscientious objector claim had been filed by him."

The foregoing statement should be used in returning such cases rather than any statement instructing the Boards of Appeal to return the files to the Local Boards.

Please acknowledge receipt of this circular.

FRANCIS BIDDLE
Attorney General

DEPARTMENT OF JUSTICE
Washington 25, D. C.

CIRCULAR NO. 4063
Supplement No. 2

December 6, 1948

TO ALL UNITED STATES ATTORNEYS AND SPECIAL ASSISTANTS TO THE ATTORNEY GENERAL, DESIGNATED AS HEARING OFFICERS UNDER SECTION 6 (j) OF THE SELECTIVE SERVICE ACT OF 1948

During the administration of the Selective Training and Service Act of 1940, this Department issued a circular to all United States Attorneys and Hearing Officers relative to "Special procedure for handling appealed conscientious objector cases wherein the registrant also claims to be entitled to classification in Class IV-D as a minister of Religion or a Theological or Divinity Student" and outlined this special procedure.

In the administration of the Selective Service Act of

1948 no arrangements have been made by the Selective Service System for any special procedure with relation to cases in this category. Therefore, these cases are to be handled in accordance with the existing regulations in the same manner as all other cases of registrants claiming conscientious objection.

PEYTON FORD
The Assistant to the Attorney General

DEPARTMENT OF JUSTICE
Washington 25, D. C.

July 18, 1949

CIRCULAR NO. 4063
Supplement No. 5

TO ALL UNITED STATES ATTORNEYS:

PROCEDURE TO BE FOLLOWED IN APPEALED CONSCIENTIOUS OBJECTOR CASES WHEREIN THE REGISTRANT ALSO CLAIMS CLASSIFICATION IN CLASS IV-D

In all cases of appealed conscientious objector claims when it appears from an examination of the registrant's Selective Service file that he is relying upon his claim as a minister, the Department has requested the Federal Bureau of Investigation to contact the office of the United States Attorney to determine if the registrant should be interviewed in the event he desires to furnish a statement withdrawing his claim as a conscientious objector and stating that he is relying upon his claim as a minister.

Should the registrant execute such a withdrawal of his claim it would remove the case from the jurisdiction of the Department of Justice and it would then be unnecessary to proceed any further and the case can be closed in the Department and the file returned to the Appeal Board from which the United States Attorney received it with the request that the Appeal Board advise the United States Attorney of the ultimate classification of the registrant. Therefore, whenever it is possible to do so the United States Attorney should grant this permission to the Federal Bureau of Investigation when they make such a request.

In the operation of the Selective Training and Service Act of 1940, the United States Attorneys were advised that in any cases where they were in doubt as to the registrant's claim for ministerial status, the file should be sent to the Office of the Assistant to the Attorney General, but in the operation of the present Act of 1948 it will not be necessary for this latter action to be taken and if the registrant does not execute a withdrawal statement as described above, then the case should be handled in the usual manner.

PEYTON FORD
The Assistant to the Attorney General

Appendix B

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

Washington 25, D. C.

LOCAL BOARD MEMORANDUM NO. 41

ISSUED: November 30, 1951.
AS AMENDED: August 15, 1952.

SUBJECT: WITHDRAWAL OF CLAIM OF CONSCIENTIOUS OBJECTION

1. Purpose.—The purpose of this Local Board Memorandum is to furnish information as to the circumstances under which claims of conscientious objection made by registrants should be considered to have been withdrawn.

2. What Constitutes a Claim of Conscientious Ojection. —A registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector.

3. Withdrawal of Claim Must Be in Writing.—Whenever a registrant has claimed conscientious objection to war the claim shall not be considered to have been withdrawn until the registrant voluntarily submits, and there is filed in his Cover Sheet (SSS Form No. 101), a written statement signed by him specifically withdrawing the claim. No verbal statement made by the registrant shall be considered as a withdrawal of his claim of conscientious objection. After such written withdrawal has been filed, the previous claim of conscientious objection shall be disregarded when considering the classification of the registrant.

4. When Claim Should Not Be Considered Withdrawn. —(a) A claim of conscientious objection should not be

considered to have been withdrawn even though the registrant has filed a written withdrawal of his claim if it appears that the withdrawal was not a voluntary act on the part of the registrant or that the withdrawal was induced or procured by a representative of the Selective Service System or any other Government official. The claim should not be considered withdrawn if the registrant's written withdrawal was induced by any representation or suggestion that, if he withdrew the claim, he would receive more favorable consideration of other claims, or greater weight probably would be given to another claim. If the registrant has been advised that he must withdraw his claim of conscientious objection before he may appeal his classification on other grounds, the registrant's written withdrawal of his claim is not voluntary and the claim should not be considered withdrawn.

(b) When a registrant who has claimed conscientious objection has filed a written notice of appeal in which he appealed his classification solely on the basis of any other claim or claims, such action does not constitute a withdrawal of his claim of conscientious objection. For example, if in such a case the registrant appeals only as a minister, his claim of conscientious objection is not thereby withdrawn.

(signed) LEWIS B. HERSHEY
Director

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 791

MARSHALL NEAL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 138-149) is reported at 203 F. 2d 111.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1953 (R. 149). On April 21, 1953, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari until May 11, 1953 (R. 162), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also rule 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's waiver of his claim to exemption as a conscientious objector was illegally induced.

2. Whether a letter from petitioner to his local draft board at Houston, Texas, should have been interpreted as a request for a personal appearance in spite of the fact that petitioner stated in the letter that he was unable to come to Houston but would like to be heard at Austin, where he then resided.

3. Whether the local board, having already sent petitioner an order to report for induction, was justified in declining to reopen petitioner's case.

4. Whether there was a basis in fact for the local board's rejection of petitioner's claim to exemption as a minister.

5. Whether the trial court erred in denying petitioner's motion for production of a report made by the F.B.I. agent following the interview at which petitioner waived his conscientious objector claim.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 6(j), Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 456(j), provided in pertinent part:

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the

appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 6(g), Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 456(g), provided:

Regular or duly ordained ministers of religion, as defined in this title, and students pre-

paring for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

Section 16(g)(3), Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 466(g)(3), provided:

> The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

Selective Service Regulations 32 C.F.R. 1624.1 (a) provides:

> *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board * * *, shall have an opportunity to appear in person before the

> member or members of the local board designated for the purpose if he files a written request therefor within ten days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended * * *.

Selective Service Regulations 32 C.F.R. 1625.2 provides:

> *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

STATEMENT

In a one-count indictment filed in the United States District Court for the Western District of

Texas on May 7, 1951, petitioner was charged with having knowingly refused service in the armed forces of the United States, in violation of 50 U.S.C. App., Supp. V, 462(a) (R. 1-2). Thereafter, on January 29, 1952, following a trial without a jury, petitioner was sentenced to imprisonment for a period of three years (R. 123). On appeal to the Court of Appeals for the Fifth Circuit, the judgment of conviction was unanimously affirmed (R. 149).

Petitioner registered with his local board in Houston, Texas, on September 13, 1948 (R. 25). On August 10, 1949, he filed his classification questionnaire in which he stated that he had been a minister of Jehovah's Witnesses since June 6, 1946, that he had been formally ordained by the Watch Tower Bible and Tract Society of Houston, and that in addition to working at the ministry he did secular work (R. 34, 47). After filing his classification questionnaire, petitioner also filed a Special Form for Conscientious Objectors (SSS Form 150), and attached thereto certain papers indicating his conscientious objection to both combatant and noncombatant military service (R. 26, 48-49). On August 22, 1950, he was given a 1-A-O classification (available for noncombatant service) (R. 26). No request was made for a personal appearance, but an appeal was filed on August 29, 1950 (R. 29). The board of appeals for Texas reviewed the file and on September 15, 1950, determined that he was not entitled to a IV-E classification.[1] It then for-

[1] At that time complete deferment from all military service

warded the file to the Department of Justice for an advisory opinion on the conscientious objector claim, in accordance with Selective Service Regulations (32 C.F.R. 1626.25). (R. 30.) However, the Department of Justice never furnished such an opinion, for on or about November 2, 1950, petitioner signed a statement voluntarily withdrawing his conscientious objector claim (R. 50-51, 72-73). Petitioner's selective service file was then returned to the appeal board, from where it was sent back to the local board. The local board reopened the case, and on December 6, 1950, reclassified petitioner 1-A (R. 30). On December 12, 1950, petitioner, who then resided at Austin, Texas, wrote the local board at Houston, as follows:

> I would like to appeal such classification, because of the fact I am an ordained minister of the gospel. I would like very much to appeal in person before the particular draft board in which I am registered with, but because of me living here in Austin, Texas, I am not able to do so. But if there is any ways that can be made for me to appear in person here in Austin I would appreciate it very much. The reason why I would like to make such appearance, so that I can prove to you beyond any future doubt that I am an ordained minister of the gospel. [Deft.'s Ex. 14.]

Due to the impossibility of the Houston board's

---

was available to persons demonstrating conscientious opposition to both combatant and noncombatant service. The classification given was IV-E. At the present time, such persons receive I-O (available for civilian work in the national interest) (32 C.F.R. 1622.14).

going to Austin to hear petitioner in person, this letter was interpreted as a request for reopening and appeal. On January 4, 1951, the board voted against reopening (R. 31), and on January 12, 1951, the appeal board upheld the 1-A classification (R. 30).

On January 24, 1951, petitioner wrote a letter to General Hershey in which he stated that he felt that he had been wrongfully induced in November 1950 to surrender his conscientious objector claim by an F.B.I. agent's (Special Agent Burt) representations that he could not claim exemption on both grounds. Thereafter, the file was called in to State Headquarters of the Selective Service System at Austin, and the State Director asked the United States Attorney to check with Burt concerning the alleged false representations at the time the waiver was secured from petitioner. Burt emphatically denied that he had made any such representations. On March 5, 1951, after having reviewed the file and interviewed petitioner in person, the State Director wrote the local board a letter stating in part (R. 32):

> This letter is not a request for the reopening of this registrant's case, but is merely to advise your board that if the registrant can present a case now to you which would show he is a duly ordained minister of religion and "as his regular and customary vocation teaches and preaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization" your board

> could request this headquarters for permission to reopen the case.

On March 7, 1951, petitioner appeared before the local board at Houston and testified concerning his alleged ministry (R. 53-58). At the close of this hearing, the local board telephoned the State Director for advice, and the next day, March 8, the State Director wrote the board, in part, as follows:

> You are advised that, under the limitations of Part 1625.2 of the Regulations, it is the opinion of this Headquarters that your local board has no authority to reopen the case of this registrant unless your board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.[2]
>
> * * *

The board, following receipt of this letter, voted 5-0 against reopening the case (R. 40). Thereafter, petitioner's file was transferred to Austin and on March 13, 1951, the Austin board notified petitioner to report for induction on March 21, 1951. He reported, but, as stipulated by counsel, refused to be inducted (R. 24).

ARGUMENT

1. Petitioner's contention that the waiver of his conscientious objector claim was illegally obtained and vitiated all subsequent proceedings is based

[2] Selective Service Regulations (32 C.F.R. 1625.2, *supra*, p. 5) provide that when an induction order has issued, the change warranting reopening must have resulted from circumstances beyond the registrant's control. An induction order had issued to petitioner on February 28, 1951 (R. 27).

upon his version of a disputed issue of fact which the trial court resolved against him (Pet. 21-28). At the trial, petitioner testified that the F.B.I. agent who took his statement had first won his confidence, and then had advised him that, while he could not rely on both the conscientious objector and ministerial claims, by signing the waiver he would be able to get a IV-D (minister's) classification (R. 50-51). However, different testimony was given by the agent, who also took the stand. He stated that early in November, 1950, the F.B.I. office in Austin received a communication from the United States Attorney in Houston suggesting that petitioner be interviewed for the purpose of ascertaining whether or not he wished to rely on both his ministerial and his conscientious objector claims to exemption (R. 72). He testified that pursuant to this communication he met petitioner, spoke with him on the subject of his conscientious objector claim, and took from him a written statement withdrawing such claim (*ibid.*). The agent asserted before the court that he had made no representation whatsoever that withdrawal of the conscientious objector claim would affect in any manner petitioner's claim to exemption as a minister (R. 74), and that he assured petitioner it was immaterial to him whether or not he signed the statement (R. 100).

The divergent statements presented a question of credibility, and this question the trial court resolved against petitioner. It is beyond dispute that the trial court, which had the witnesses before it,

was best situated to decide such a factual question. *United States* v. *Johnson,* 327 U.S. 106; *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 332.[3]

United States v. *Knight,* Crim. No. 20283, decided April 25, 1951 (N.D. Ohio) and *United States* v. *Stephens,* Crim. No. 20284, decided the same day in the same court, to which petitioner refers (Pet. 22-25), are plainly distinguishable. In both cases there was found to be at least an implicit representation that by withdrawing the conscientious objector claims the ministerial claims would be more sympathetically treated. This the court regarded as particularly damaging since the ministerial claims had already been disallowed by the appeal boards. In the present case, there had been neither such a final disallowance of the IV-D claim, nor, as the trial court found, was the withdrawal of the IV-E claim induced by any representation of more favorable treatment of the ministerial claim.[4]

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[3] Unlike the situation presented in *Davis* v. *United States,* petition for a writ of certiorari pending, No. 792, this Term, this petitioner did assert the claim of misrepresentation in the administrative process (*supra,* p. 8). He had thus exhausted his administrative remedies and the issue of whether he had been denied due process became an issue for the trial court.

[4] Section III of Department of Justice Circular No. 3461, printed in Appendix A of the Petition for a Writ of Certiorari (Pet. 55-60), instructs F.B.I. agents that, *inter alia,* if the registrant does not desire to sign a statement withdrawing his claim, no attempt should be made to persuade him to do so.

In January 1951, the regulations were changed to provide for determination of the claim to ministerial exemption before consideration of the conscientious objector claim and at the same time the F.B.I. agents were directed not to inquire whether the registrant wished to elect one of the two claims. See the Government's brief in opposition in *Davis* v. *United States,* No. 792, this term.

Petitioner, having freely withdrawn his conscientious objector claim, was not entitled to a conscientious objection hearing by the Department of Justice as provided by Section 6(j) of the Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 456(j), *supra*, pp. 2-3.

2. Petitioner was not improperly denied a personal appearance before his local board (Pet. 28-38). In order to be entitled to such an appearance it is essential that the registrant file a written request (32 C.F.R. 1624.1, *supra*, pp. 4-5). While petitioner argues that a letter he wrote to the local board December 12, 1950, constituted such a request, it seems clear that it was not. He stated therein that he would like to appeal his classification, and also that he would like to appear in person but was unable to do so because he was then living in Austin. He added that he would appreciate it if he could appear in person in Austin. *Supra*, p. 7. As petitioner concedes, "[u]nder the regulations it was impossible for the local board * * * to arrange for him to appear before a board in Austin" (Pet. 29), so that the letter did not state an effective request for a personal appearance. It was proper, therefore, for the board to regard the letter as a written request for reopening and consideration anew pursuant to Selective Service Regulations (32 C.F.R. 1625.2), and for an appeal. After voting against reopening, the board forwarded the file to the appeal board. Since petitioner had not been reclassified, the local board was under no obli-

gation to inform him of its action, as petitioner contends (Pet. 29) (see 32 C.F.R. 1625.12).

3. The local board did not improperly refuse to reopen and reconsider petitioner's case, as petitioner argues (Pet. 38-40). Selective Service Regulations (32 C.F.R. 1625.2, *supra*, p. 5) authorize local boards to reopen and consider anew the classification of a registrant on the basis of new facts, which, if true, would justify a change in his classification. However, when an order to report for induction has already issued, as was the case here,[5] the regulations (*ibid.*) provide that, prior to reopening, there must be a specific finding that the change resulted from circumstances over which the registrant had no control. At a hearing held for the purpose of determining whether or not to reopen petitioner's case, petitioner appeared and testified that he then devoted 300 hours a month to preaching (R. 54-58). Even assuming that this was true and that it represented a substantial increase over the extent of his ministerial work at the time his classification questionnaire was filed, it can hardly be contended that this change was one resulting from conditions beyond petitioner's control. The board's action in declining to reopen under such circumstances was, therefore, clearly in accordance with Selective Service Regulations.

4. Petitioner also contends that the local board's original rejection of his claim to ministerial exemp-

[5] An induction order was sent to petitioner on February 28, 1951, which was a week before the local board heard petitioner's account of his changed status and decided not to reopen the case (*supra*, p. 9) (R. 27).

tion was arbitrary and capricious. However, it is firmly establshed that so long as there was a basis in fact in the file for finding that petitioner was not a minister within the terms of the Selective Service Act of 1948, Section 6(g), 50 U.S.C. App., Supp. IV, 456(g), the board's action is conclusive and may not be disturbed by the courts. *Cox* v. *United States,* 332 U.S. 442; *Estep* v. *United States,* 327 U.S. 114. Section 16(g)(3) of the Act, 50 U.S.C. App., Supp. IV, 466(g)(3), states that "[t]he term 'regular or duly ordained minister of religion' * * * does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but *who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization*" [emphasis supplied]. In light of this provision, the fact that petitioner stated in his classification questionnaire that he was a porter and a truck driver at a laundry and that he had worked at that trade for two years is enough to sustain the board's action (R. 63). In addition, the board was entitled to consider petitioner's youth (R. 62), his slight education (R. 61), the brevity of his training for the ministry (R. 63), and the fact that while authorized to perform marriage ceremonies he had only done so on one occasion (R. 68). The case for rejecting the ministerial claim is at least as strong as in the case of petitioner Cox in *Cox* v. *United States, supra,* who had pre-

sented evidence that he was a duly ordained minister of the gospel, that his entire time was devoted to missionary work, and that he preached from house to house and conducted funerals.

5. Petitioner's final contention is that the trial court erred in not ordering production of the official report made by the F.B.I. agent after he had taken petitioner's statement withdrawing his conscientious objector claim (Pet. 49-53). However, it is well settled that production of documents relating to a witness' testimony is a subject for the discretion of the trial judge, particularly when, as here, they are not used in court. *Goldman* v. *United States* 316 U.S. 129, 132; *United States* v. *Socony-Vacuum Co.,* 310 U.S. 150, 231-237; *Lennon* v. *United States,* 20 F. 2d 490, 493 (C.A. 8). That discretion may be abused, as where production and inspection of admittedly contradictory prior statements by key witnesses on importantly relevant matters are refused. *United States* v. *Krulewitch,* 145 F. 2d 76 (C.A. 2); *Gordon* v. *United States,* 344 U.S. 414. But that is not the case presented here, since the agent on cross-examination repeatedly denied that the report in question contained anything of significance other than petitioner's statement of waiver which was already in evidence. This is a patently different situation from that found in the *Gordon* case, *supra,* where, as this Court observed (344 U.S. at 418-419):

> By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents * * * were made

> by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried * * * The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up.

Here, counsel for petitioner stated that if the report were produced "I may be able to impeach this witness" (R. 89), but was unable to specify how this would be done. Full cross-examination of the agent was permitted, and the trial court, in the exercise of its discretion to control the extent of cross-examination, *Glasser* v. *United States,* 315 U.S. 60, 83, properly refused a request for production that was based on nothing more than the mere possibility that "something impeaching might turn up" (344 U.S. at 419).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
HOWARD ADLER, JR.,
Attorneys.

JUNE 1953.

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SUPREME COURT OF THE UNITED STATES

No. 5 ORIGINAL.—OCTOBER TERM, 1952.

THE STATE OF NEBRASKA, Complainant,

v.

THE STATE OF WYOMING, Defendant,

and

THE STATE OF COLORADO, Impleaded Defendant,
THE UNITED STATES OF AMERICA, Intervener.

Order Modifying and Supplementing Decree of October 8, 1945.

[June 15, 1953.]

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U. S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I (a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except

that for a period of five years from and after [the date of the entry of this order to be inserted by the Court] the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564–595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tribu-

taries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in ac-

cordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;

Second, Guernsey Reservoir;

Third, Seminoe Reservoir;

Fourth, Alcova Reservoir; and

Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska

appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and

transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agree-

ment, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.